METRO PACIFIC SDN BHD

v.

KETUA PENGARAH KESATUAN SEKERJA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING SUMMONS NO: R1-24-79-99]
10 SEPTEMBER 2001

ADMINISTRATIVE LAW: *Remedies - Declaration - Mandamus - Leave of Court - Application for mandamus under s. 44 Specific Relief Act 1950 - Whether required leave of court - Sections 44 & 45 Specific Relief Act 1950 - Whether subject to O. 53 r. 1 Rules of High Court 1980*

ADMINISTRATIVE LAW: *Remedies - Declaration - Mandamus - Leave of court - Application for mandamus under s. 25(2) Courts of Judicature Act 1964 and para. 1 of Schedule thereto - Whether required leave of court - Rules of High Court 1980, O. 53 r. 1 - Courts of Judicature Act 1964, s. 25(2), para 1 of Schedule*

ADMINISTRATIVE LAW: *Remedies - Judicial review - Declaration - Application for declaration under Trade Unions Act 1959 - Act providing procedure for appeal - Whether application untenable - Allegation of illegality - Whether applicant need not exhaust statutory right of appeal when illegality is alleged - Trade Unions Act 1959, ss. 25A(1), 71A - Industrial Relations Act 1967, s. 45(1)*

The plaintiff is employer to 557 employees ('the employees), all of whom were members of the Timber Employees Union, Peninsular Malaysia, the second defendant herein. On 29 May 1999 the employees went on strike, whereupon the plaintiff applied for a declaration that the strike was illegal and that the employees, by reason thereof, had ceased to be members of the second defendant. The application was made pursuant to s. 25A(1) of the Trade Unions Act 1959 ('TUA') and s. 45(1)(a) of the Industrial Relations Act 1967 ('IRA') respectively. This apart, the plaintiff also applied for an order of *mandamus* seeking to compel the first defendant, the Director General of Trade Unions, to take certain specific actions against the second defendant. The application for *mandamus* was made pursuant to s. 44 of the Specific Relief Act 1950 ('SRA'), s. 25(2) of the Courts of Judicature Act 1964 ('CJA') and para. 1 of the Schedule to CJA respectively.

Before the learned judge, the first defendant raised a preliminary objection that leave under O. 53 r. 1(1) Rules of the High Court 1980 ('RHC 1980') is a condition precedent to an application for *mandamus*, and since this has not been obtained, the plaintiff's application for the remedy was misconceived in law. The second defendant contended that the plaintiff's application under the provisions of TUA and IRA ought to be dismissed under O. 18 r. 19 RHC 1980, as the plaintiff ought to have, but has not exhausted its statutory right of appeal under s. 71A TUA.

The plaintiff argued that the remedy under s. 44 SRA and the procedure for applying the remedy as prescribed under s. 45 of the Act were not subject to O. 53 r. 1 RHC or any other statute. It was further contended that the power to grant public law remedies under the provisions of CJA could not be limited by the RHC, citing in support thereof *R Rama Chandran v. The Industrial Court of Malaysia*.

The primary issues that arose were: (i) whether leave under O. 53 r. 1 RHC is a condition precedent to an application for an order of *mandamus* under: (a) s. 44 SRA; and (b) s. 25(2) CJA and para. 1 to the Schedule of the Act; and (ii) whether the plaintiff ought to have exhausted the alternative remedy under s. 71A of TUA 1959, and if so, whether the court herein was debarred from issuing the declaratory judgment sought for.

Held:

[1] Section 44 SRA relates to the High Court judge's power to order a person holding a public office, a corporation or a subordinate court to do certain specific acts, whereas s. 45 SRA provides the procedure for making the application and the procedure and consequential steps the judge has to adopt in dealing with the application. (pp 665 d-e & 666 d)

[2] Whilst s. 44 SRA has to be exercised subject to the procedure set out in s. 45, nowhere is it mentioned therein that the procedure is subject to any other written law or rules of court relating to the same. This is unlike other provisions in the SRA, such as ss. 9, 20(2), 43 and 51, which are expressly made subject to "the law relating to civil procedure". The procedure under s. 45 SRA, therefore, is not subject to O. 53 r. 1 RHC or any other statute. (p 666 g-h)

[2a] Consequently, the remedy of an order requiring a specific act to be done or forborne by, *inter alia*, a person holding a public office which may be given as stated in s. 44 SRA exists independently of the remedy of

a the order of *mandamus* referred to in O. 53 r. 1 RHC or the remedy of the order of *mandamus* under the additional power given under para. 1 of the Schedule to the CJA. (p 667 a-b)

[3] As a matter of record, O. 53 was amended in 2000 by the Rules of the High Court 2000 (PU(A) 342/2000) after the originating summons herein b was filed, and it is quite clear from O. 53 r. 1 thereof that the order "is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950" (which includes ss. 44 and 45) meaning that the remedy under s. 44 SRA and the procedure for applying for the remedy are not subject to the said O. 53 RHC. (p 667 h)

c

[4] Reading the judgment of *R Rama Chandran v. Industrial Court of Malaysia*, it is obvious that the court therein meant that no inroads can be made into the area of substantive law but clearly the court recognised that the procedure to move the application for prerogative orders (powers d additionally conferred on the High Court by para. 1 of the Schedule to CJA) shall be in accordance with the requirements of O. 53 RHC. (p 668 d-e)

[4a] It follows therefore that the application for *mandamus* under para. 1 of the Schedule to the CJA as filed on 26 November 1999 herein cannot e be considered unless leave had in the first place been obtained in an application under O. 53 r. 1 of RHC as it stood at the date of the application. In the circumstances, prayer (c) of the plaintiff's originating summons, which referred to a consequential order under s. 25(2) CJA 1969 and para. 1 of the Schedule to the Act, is struck out. (pp 668 h f & 669 a)

[5] As to whether the plaintiff ought to have exhausted the alternative remedy provided for under s. 71A TUA, the applicable principle is that, if the plaintiff could demonstrate illegality, it would be wrong to insist that he exhausts his statutory right of appeal. (p 670 h-i)

g

[5a] The plaintiff has clearly alluded to the decision of the first defendant not to take any action on the illegal strike as being a nullity. However, whether the first defendant's decision is a nullity must be decided at the hearing of the merits of the case and the issue of whether, in the context h of para. (d) of s. 44 SRA, the High Court could make the order directing the first defendant to make a decision when the plaintiff has other specific or adequate legal remedy to resort to. (p 671 c-d)

[First defendant's objections overruled; second defendant's application to strike out dismissed; prayer (c) of OS struck out.]

i

Case(s) referred to:

Chan Mun Poy v. Director-General of Telecommunications and Anor [1981] 2 MLJ 293 ***(not foll)***

Eu Finance v. Lim Yoke Foo [1982] 2 MLJ 37 ***(foll)***

Harkness v. Bell's Asbestos & Engineering Ltd [1967] 2 QB 729 ***(foll)***

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director-General of Trade Unions & Ors [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218 HC ***(foll)***

Manggai v. Government of Sarawak & Anor [1977] 2 MLJ 44 ***(refd)***

MPPP v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor [1999] 3 CLJ 65 FC ***(foll)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(foll)***

Yap Peng Sang v. Menteri Kementerian Sumber Manusia [1998] 5 CLJ 804 HC ***(not foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)
Industrial Relations Act 1967, s. 45(1)(a), sch para 1
Rules of the High Court 1980, O. 1 r. 2(2), O. 18 r. 19, O. 53 r. 1(1), 2, 3(1)
Specific Relief Act 1950, ss. 9, 20(2), 43, 44, 45, 46, 51, chapter VIII part 2
Trade Unions Act 1959, ss. 25A(1)(a), (3)(a), (b), (c), (4), 71A

For the plaintiff - Steven Thiru (Jack Yow); M/s Shook Lin & Bok
For the 1st respondent - Azizah Hj Nawawi SFC
For the 2nd respondent - P Kuppusamy; M/s P Kuppusamy & Co

Reported by WA Sharif

JUDGMENT

KC Vohrah J:

This decision deals with two matters. One relates to the preliminary objection by the Director-General of Trade Unions ("the 1st defendant") that the declaratory prayer by Metro Pacific Sdn Bhd ("the plaintiff") for an order compelling the 1st defendant to perform some statutory duty in its originating summons is misconceived in law. The other relates to an application by the Timber Employees Union, Peninsular Malaysia ("the 2nd defendant") to strike out the originating summons.

From the originating summons it appears that the plaintiff's cause of action is founded on a strike which took place on 29 May 1999 initiated by 557 members of the 2nd defendant who were also employees of the plaintiff. It is not disputed that the union ("the 2nd defendant") is under the purview of the Director-General of the Trade Unions, the 1st defendant, pursuant to the Trade Unions Act 1959.

In essence the plaintiff's case that the strike was illegal rests on two grounds:

(a) that the 2nd defendant had failed to carry out a strike ballot as required under s. 25A(1)(a) of the Act, and

(b) that the strike was predicated on the plaintiff's retrenchment exercise and by virtue of s. 45(1)(a) of the Industrial Relations Act 1967 a strike on that basis would be illegal.

In the originating summons the plaintiff applied for the following orders:

(a) a declaration that the strike held on 29 May 1999 was an illegal strike contrary to s. 25A(1)(a) of the Trade Unions Act 1959 and/or s. 45(1)(a) Industrial Relations Act 1967;

(b) a declaration that because of their participation in the illegal strike, the relevant employees ceased to be members of the 2nd respondent;

(c) a consequential order under s. 44 Specific Relief Act 1950 (SRA 1950) and/or s. 25(2) Courts of Judicature Act 1964 (CJA 1964) and para. 1 of the Schedule to the Act, compelling the 1st defendant to hold that the strike was illegal and to compel the 2nd defendant to comply with s. 25(A)(3)(a), (b) and (c) of the Trade Unions Act 1959 and in default thereof, take action against the 2nd respondent under s. 25A(4) of the same Act.

It is common ground that the consequential relief prayed for in prayer (c) is a declaratory order in the nature of *mandamus*.

The 1st defendant's preliminary objection to the prayer in the proceedings is that in any application for *mandamus* leave under O. 53 r. 1(1) of the Rules of the High Court 1980 (RHC 1980), as a condition precedent, must be first obtained and this condition has not been fulfilled.

The 2nd defendant's application to strike out the originating summons under O. 18 r. 19 RHC 1980 is on the ground principally that the plaintiff has not exhausted its remedy under s. 71A of the Trade Unions Act 1959.

1st Defendant's Application

The 1st defendant argues that while the law does not preclude the plaintiff from resorting to different avenues provided by law in order to obtain the remedy sought for, however, whether the application for *mandamus* or an order in the nature of *mandamus* is made under s. 44 SRA 1950, under O. 53 RHC 1980 or under s. 25(2) CJA 1964, leave of the court as required under O. 53 r. 1(1) RHC 1980, must first be obtained as a condition precedent.

The 1st defendant relies on the ruling in *Yap Peng Sang v. Menteri Kementerian Sumber Manusia* [1998] 5 CLJ 804 for this proposition of law:

> So, it is clear from the authorities that whether the application sought is for an order of *mandamus* as mentioned in O. 53 r. 1(1) of the Rules of the High Court 1980, or for an order requiring any specific act to be done by any person holding a public office as mentioned in section 44 of the Specific Relief Act 1950, or for directions, orders or writs, including writs of the nature of *mandamus* as mentioned in paragraph 1 of the Schedule to the Courts of Judicature Act 1964, the leave of the Court as required by O. 53 r. 1(1) of the Rules of the High Court 1980 must first be obtained as a condition precedent.

The plaintiff, however, submits that the procedure under s. 45 SRA 1950 which relates to the exercise of the power of a judge under s. 44 SRA 1950, is not subject to O. 53 r. 1 RHC 1980 or any other statute.

I agree with the argument.

Section 44 SRA 1950 relates to the High Court judge's power to order a person holding a public office, a corporation or a subordinate court to do certain specific acts. It reads:

> 44.(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
>
> Provided that:
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
>
> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
>
> (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
>
> (d) the applicant has no other specific and adequate legal remedy; and
>
> (e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorise a Judge:

(a) to make any order binding on the Yang di Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

To be noted is that nowhere in the section is the word "*mandamus*" used and that under s. 46 of SRA 1950 "(neither) the High Court nor any other court in Malaysia shall hereafter issue any writ of *mandamus*." However, the order that may be made, in so far as it relates to a person holding public office, has the effect of making that person to perform a public legal duty which is the essence of *mandamus*.

Next, s. 45 on which the plaintiff relies must be looked into. It provides the procedure for making the application and the procedure and consequential steps the judge has to adopt in dealing with the application. It will be noted that the procedure is different from the procedure prescribed under O. 53 relating to the application for an order of *mandamus*, prohibition or *certiorari* and the steps the judge has to take in dealing with the application. Section 45 reads:

45. Every application under section 44 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice, and the denial thereof; and a Judge may, in his discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made. If, in the last case, the person, court, or corporation complained of shows no sufficient cause, the Judge may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the Judge fixes in this behalf.

It has to be noted that s. 44 has to be exercised subject to the procedure set out in s. 45 but nowhere is it mentioned therein that the procedure therein is subject to any other written law or rules of court relating to the same. This is unlike other provisions in the SRA 1950 which are expressly made subject to "... the law relating to civil procedure" (see ss. 9, 20(2), 43 and 51 SRA 1950). There is nothing in ss. 44 or 45 to say that leave has to be obtained before application for the remedy is sought for.

My view is that the remedy of an order requiring a specific act to be done or forborne by, *inter alia*, a person holding public office which may be given as stated in s. 44 exists independently of the remedy of the order of *mandamus* referred to in O. 53 r. 1 which may be made or the remedy of the order of *mandamus* under the additional power given under para. 1 of the Schedule to the CJA 1964.

I am aware that in *Chan Mun Poy v. Director-General of Telecommunications and Anor* [1981] 2 MLJ 293, a High Court case, it was held that since 1 June 1980 after the coming into force of the RHC 1980, leave of the court would be required under O. 53 r. 1(1) before an order for *mandamus* could be sought. With respect I think it was not drawn to the attention of the court O. 1 r. 2(2) as it stands now and as it stood in 1980 and at the date of the decision:

ORDER 1

Citation and commencement (O. 1 r. 1)

1. ...

Application (O. 1 r. 2)

2. (1) Subject to the following provisions of this rule, these rules shall have effect in relation to all proceedings in the High Court, including any pending proceedings herein.

(2) These rules shall not have effect in relation to proceedings in respect of which rules have been or may be made **under any written law for the specific purpose of such proceedings** or in relation to any criminal proceedings.

(3) In the case of proceedings for which rules have been made, nothing in paragraph (2) shall be taken as affecting any provision of any rules (whether made under the Act or **any other written law**) by virtue of which the Rules of the High Court 1980 or any provisions thereof are applied in relation to any of those proceedings. (emphasis added)

As a matter of record, O. 53 was amended in 2000 by the Rules of the High Court 2000 (PU(A) 342/2000) after the originating summons was filed and it is quite clear from O. 53 r. 1 that the order "is subject to the provisions of Chapter V111 of Part 2 of the Specific Relief Act 1950" (which includes ss. 44 and 45) meaning that the remedy under s. 44 and the procedure for applying for the remedy are not subject to O. 53.

I now come to the prayer which relates to a consequential order to be made under s. 25(2) CJA 1964 and para. 1 of the Schedule to the Act.

The objection to that prayer is on the ground again that no leave has been obtained under O. 53 r. 1, bearing in mind the proviso to s. 25(2) which reads:

> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same and O. 53(1) as it stood at the time of filing of the case provided that no application for an order of, *inter alia*, *mandamus* shall be made unless leave therefore had been granted under the rule.

The plaintiff points to *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 where Edgar Joseph Jr FCJ had stated that the power to grant public law remedies envisaged by para. 1 to the Schedule to CJA 1964 cannot be limited by the Rules of the High Court 1980.

From the reading of the judgment on that case it is, however, obvious that His Lordship meant that no inroads can be made into the area of substantive law but clearly His Lordship recognised that the procedure to move the application for the prerogative orders (powers additionally conferred on the High Court by para. 1 to the Schedule CJA 1964) shall be in accordance with the requirements of O. 53 RHC 1980.

The distinction between the aspects of procedural law and substantive law touched upon in this case was summed up by his lordship thus:

> It follows, therefore, that while our O. 53 can only prescribe the **procedure and practice** to be followed by parties when applying for Judicial Review, the source of **power** enjoyed by our courts to grant relief in Judicial Review proceedings is the prerogative jurisdiction inherited from the United Kingdom courts and, most importantly, para. 1 of the Schedule read with s. 25 of the Courts of Judicature Act 1964. The proviso to s. 25(2), and more particularly, the Rules of the High Court 1980, do not – and indeed cannot – narrow down or diminish or curtail the scope of the powers conferred upon our courts in Judicial Review proceedings.

It follows that the application for consequential relief under para. 1 of the Schedule to the CJA 1964 filed on 26 November 1999 cannot be considered unless leave had in the first place been obtained in an application under O. 53 r. 1 of the RHC 1980 as it stood at date of the application. In any event under the new O. 53 r. 2 an application for any of the reliefs specified in para. 1 of the Schedule to CJA 1964 shall be in a prescribed form and no application under the order shall be made unless leave has been granted (r. 3(1)).

I therefore agree with the first defendant that the relief prayed for under para. 1 to the Schedule to CJA 1964 cannot be considered and I strike out the reference to it.

2nd Defendant's Application

The 2nd defendant has applied to strike out the originating summons on the ground that it discloses no reasonable cause of action and that otherwise it is an abuse of process.

I do not propose to go into the details as to the facts of the case which the 1st defendant says disclose no reasonable cause of action. Suffice it to say the 2nd defendant states that the issue raised in the originating summons had been resolved or settled and that there is therefore no utility in the relief sought by the plaintiff. Additionally, it is argued, that since there is a specific remedy or appeal procedure prescribed under s. 71A of the Trade Unions Act 1959 a declaratory judgment cannot be issued by the court.

Let me first deal with the argument that the plaintiff should have exhausted alternative remedies.

The provision which the 2nd defendant refers to is reproduced below:

> 71A. (1) Any person who is dissatisfied with any opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be given, made or effected by the Registrar under any of the following provisions:
>
> (a) section 2(2);
>
> (b) section 12;
>
> (c) section 15(2)(b) or section 15(4);
>
> (d) section 16(1);
>
> (e) section 17(1);
>
> (f) section 25A(4);
>
> (g) section 28(1)(d), or section 29(2)(b);
>
> (h) section 34(2);
>
> (i) section 40(6) or (40)(9);
>
> (j) section 54(1);
>
> (k) section 76A(1); or
>
> (l) section 76(1),

> may, within thirty days from the date of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision of the Registrar, appeal against the same to the Minister, in such manner as may be prescribed by regulations.

The plaintiff argues that s. 71A is couched in discretionary terms and accordingly it is not mandatory for the plaintiff to appeal to the minister over the failure of the 1st defendant to exercise his statutory duty to take action on the illegal strike. Reliance is placed on *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director-General of Trade Unions & Ors* [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218, where it is said that the High Court held that the use of the word "may" meant that the domestic remedy was not the only remedy open to the litigant and on *Manggai v. Government of Sarawak & Anor* [1977] 2 MLJ 44 where it was held that the court will not make a declaratory judgment where an adequate alternative is available.

In regard to the case cited by plaintiff, *Kesatuan Pekerja Pembuatan Barangan Galian Bukan Logam* it is incorrect to say that the court held that the word "may" meant that the domestic remedy was not the only remedy open to the litigant. The court interpreted the word "may" in respect of sections other than s. 71A and in regard to s. 71A in an obvious reference to the remedy of appeal under s. 71A of the Trade Unions Act 1959 the court has this to say, at p. 413 (p. 227):

> As for the point that the plaintiff should have availed itself of the remedy of appeal provided for in the Trade Unions Act 1959, I propose disposing of this ground by referring to the well known line of authorities which establish the proposition that when, as here, it is alleged that a decision is a nullity, a plaintiff is not bound to resort to the remedy of an appeal but may instead have recourse to collateral proceedings to attack the decision.

His Lordship Edgar Joseph Jr J (as he then was) then referred to *Harkness v. Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 and *Eu Finance v. Lim Yoke Foo* [1982] 2 MLJ 37 for this principle of law.

In a further development of this principle his lordship in another case this time a Federal Court case *MPPP v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 CLJ 65, at p. 94, after an analysis of English cases, had this to say:

> Speaking generally, it is right to say that if an applicant in judicial review proceedings can demonstrate illegality, that is to say, unlawful treatment, it would be wrong to insist that he exhausts his statutory right of appeal where one is available. Why should illegal action not be nipped in the bud by the quicker, more convenient and adequate remedy of Judicial Review rather than

appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest. (*R v. Huntingdon District Council; ex p Cowan & Anor* [1984] 1 WLR 501 (a Licensing appeal).

It is thus in the context of the further development of the principle that the case of *Manggai* has to be viewed.

It will be noted that the manager of human resources and administration of the plaintiff in his affidavit in reply to the affidavit to strike out the originating summons clearly alludes to the decision of the 1st defendant as being a nullity and this is in relation to material facts which had been pleaded that the 1st defendant's decision not to take any action on the illegal strike is a nullity. Whether his decision is a nullity, to my mind, will have to be decided at the hearing of the merits of the case and the issue of whether in the context of para. (d) of s. 44 SRA 1950 the High Court cannot make the order directing the 1st defendant to make a decision as the plaintiff has other specific or adequate legal remedy can properly be decided.

And in regard to the merits of the case that brings me to the argument by the 1st defendant that the issue of the retrenchment has been settled between the plaintiff and the employees and that there is no basis for the action. It is, however, the submission of the 2nd defendant that the settlement agreement does not cover the illegal strike or the legal consequences of it and it is pointed out that the settlement agreement does not even mention the illegal strike. These are matters to be determined at the hearing of the merits of the case.

In the result I overrule the objection of the 1st defendant and dismiss the application of the 2nd defendant to strike out the summons save that in regard to the objection raised by the 1st defendant the reference in prayer (c) of the originating summons to a consequential order under s. 25(2) CJA 1964 and para. 1 of the Schedule to the Act is struck out. Costs in the cause.